83-579

Office-Supreme Court, U.S.
FILED
OCT 5 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN WILLIAM ELKINS,

Petitioner,

vs.

BOARD OF LAW EXAMINERS
OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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Petitioner, In Propria Persona

QUESTIONS PRESENTED

1. Whether the Board of Law Examiners and the North Carolina Supreme Court failed to adequately consider and weigh Petitioner's substantial evidence presented to establish a *prima facie* showing of good moral character and thereby contravened the Due Process Clause of the Fourteenth Amendment?

2. Whether the Board and the Court rendered a conclusion as to Petitioner's moral character which is not rationally related to one isolated instance of alleged misconduct, based entirely on circumstantial evidence, occurring six years prior to Petitioner's application for admission to the North Carolina Bar and thereby violated due process?

3. Whether the Board and the Court violated due process by rendering a conclusion as to Petitioner's moral character based on a finding that he allegedly gave false testimony regarding one incident of alleged misconduct where said finding is made on a

greater-weight-of-the-evidence standard of proof and reviewed as to whether there was substantial evidence in support of the finding?

4. Whether there was sufficient evidence in the record to support the Board's finding that Petitioner testified falsely concerning one incident of alleged misconduct such that the Board's and the Court's determination of Petitioner's moral character is rationally related to any such evidence?

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The Petitioner, John William Elkins, respectfully prays that a Writ of Certiorari issue to review the reversal on appeal by the North Carlina Supreme Court of a decision by the Superior Court of Wake County reversing a decision by the Board of Law Examiners of North Caplina to deny Petitioner his right to take the February, 1981 North Carolina Bar Examination.

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OPINIONS IN LOWER COURTS

The opinion of the North Carolina Supreme Court in the case sub judice, entitled In the Matter of John William Elkins, was rendered on May 3, 1983 and is reported at 308 NC 317, 302 SE2d 215. (Appendix, pp. 1-36) A Petition for Rehearing was summarily denied without opinion on July 7, 1983. (Appendix, p. 64) The other orders and decisions in this case appear in the Appendix but were not reported.

JURISDICTION

The judgment on which review is sought was rendered by the North Carolina Supreme Court on May 3, 1983. This Petition was timely filed within 90 days of the denial on July 7, 1983 by the North Carolina Supreme Court of a Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 USC 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall ...

deprive any person of life, liberty or property, without due process of law ... "

STATEMENT OF THE CASE

Petitioner applied to take the February, 1981 North Carolina Bar Examination by written application. No contention is made that he failed to provide all information requested. On January 29, 1981, Petitioner appeared before a three-member panel of the Board of Law Examiners (hereinafter, "Board") to answer questions concerning a 1975 arrest and related civil suit. In an order dated January 30, 1981, the Board denied Petitioner's application to take the bar examination based on his failure to demonstrate sufficiently good moral character.

Petitioner was permitted to take the February, 1981 bar examination pending his appeal. The results of the examination have been ordered permanently sealed.

Petitioner appealed to the full Board and was heard on May 15, 1981. The subject

of the Board's inquiry concerned an arrest of Petitioner on July 14, 1975 in Chapel Hill, North Carolina for illegal entry and peeping secretly. At the time, Petitioner was 22 years old and finishing work on a senior honors thesis in college. The facts underlying the arrest are largely undisputed and have been thoroughly covered in a portion of the opinion of the North Carolina Supreme Court. Those facts, appearing at pages 6-11 of the Appendix, are hereby incorporated by reference. Any dispute in the reporting of the facts will be discussed infra under Reasons for Granting the Writ.

The Petitioner pleaded not guilty in a court trial on September 21, 1975 in Orange County District Court. At the conclusion of the trial, a fine of $50.00 was imposed and Petitioner was given a prayer for judgment.

A civil suit was filed against Petitoner in 1976 alleging invasion of privacy arising out of the allegations on which he was arrested

in 1975. The suit was tried before a jury in May, 1977 in Orange County Superior Court. At the conclusion of the plaintiff's evidence, the Court granted a directed verdict for the defendant, Petitioner herein.

The Board issued an Order dated August 21, 1981, (Appendix, pp. 37-51), in which it made 18 findings of fact, all relating to the July 14, 1975 incident or to Petitioner's testimony before the Board concerning the incident. The Board found that Petitioner committed misconduct on July 14, 1975 and gave false testimony to the Board about it. It also found that he made false statements in the interrogatories in the civil suit. The Board concluded that the misconduct and false testimony were " singularly and in conjunction" sufficient to deny his application. (Appendix, p. 50)

The Petitioner appealed the decision to the Superior Court of Wake County. On May 26, 1982, Hon. F. Gordon Battle issued a Judgment (Appendix, pp. 51-63), in which he over-

turned the Board's decision. The Court ruled that the Petitioner made a prima facie showing of good moral character; that the Board's findings 10 through 18 were not supported by substantial evidence; that even if these findings had been supported by substantial evidence, they would not be sufficient to rebut the applicant's prima facie showing of good moral charcter; that the single act of alleged misconduct was not sufficient to rebut the evidence of theapplicant's otherwise unblemished record; that where the entire question revolved around "intent", to deny applicant's request to stand the bar examination wa an " ... unreasonable price for (him) to pay for maintaining his innocence..." (Appendix, pp. 60-63)

The Board appealed the decision to the North Carolina Supreme Court which ruled in a published opinion that Petitioner is not presently possessed of such good moral character as to entitle him to take the February, 1981 bar examination. The Court subsequently

denied a Petition for Rehearing on July 7, 1983.

The points at which the constitutional questions here raised were argued in the lower courts are set forth in the Appendix at pages 65-74.

REASONS FOR GRANTING THE WRIT

I. THE BOARD OF LAW EXAMINERS AND THE LOWER COURT HAVE NOT ADEQUATELY CONSIDERED PETITIONER'S SUBSTANTIAL PRIMA FACIE SHOWING OF GOOD MORAL CHARACTER AND HAVE THEREBY CONTRAVENED PRINCIPLES OF DUE PROCESS.

States are bound by fairness and due process to have an orderly and rational procedure for determining the fitness of applicants to the bar. Konigsberg v. State Bar of California (1957) 353 U.S. 252; Schware v. Board of Bar Examiners (1957) 353 U.S. 232.

North Carolina has adopted the procedures suggested in Konigsberg, supra, whereby the applicant has the burden of showing his good moral character and, once shown, the licensing board may seek to rebut the showing with specific instances of misconduct. See e.g. In re Rogers (1979) 297 N.C. 48 at 57, 253 S.E.2d 918.

The Petitioner presented strong evidence of good character at the hearing before the Board. He was admitted to the State Bar of California in 1979 after full disclosure of the alleged misconduct and the criminal proceedings and civil suit arising therefrom. He provided evidence that he is a member in good standing of that Bar. (Application, Appendix, pp. 82-83)

The petitioner graduated with honors in 1975 from the University of North Carolina where he had been active in campus service projects. (Application, ST 52)* He graduated from the University of North Carolina Law School in 1979. (Application) While there, he participated in a prisoner legal assistance clinic his third year. (ST 47)

The director of the clinic, Professor David Rudolf, testified at the hearing that he worked closely with Petitioner during the 1978-79 school year and found he was "conscientious, hard working, took initiative." (ST 47, RT 148) Mr. Rudolf described Petitioner as having done "a marvelous job on every single case that he had" and that he "... will make an absolutely excel-

* "ST" refers to settled transcript on appeal. "RT" refers to full reporter's transcript.

lent attorney who cares about his clients, and who does whatever he can within the bounds of ethics to represent his clients' interests." (ST 47-48, 49) Mr. Rudolf also stated he did not believe that the applicant had committed the alleged misconduct even on the strange facts of this case, given what he knows of Petitioner's integrity. (ST 50)

Grayson L. Reeves, Jr., an assistant district attorney and close friend of Petitioner for nine years, testified he had known Petitioner in college as a friend and fellow worker in campus activities and as a law student. He stated:

> [Petitioner] ... is of impeccable moral character. I've always felt that. I think he is entitled to the high regard and confidence of the public that a lawyer should be entitled to. I think he would prove to be an asset to the profession and a credit to the profession. (ST 54, RT 169-170)

A friend of fourteen years through high school and a former roommate during the months following the July 1975 incident, Paul Garrison, Jr., testified that the Petitioner is of "very high character" and would be an "excellent law-

yer." (ST 56)

Others who had known Petitioner for up to 20 years provided affidavits or letters testifying to Petitioner's high moral character. (Application, ST 114-115) Petitioner's father and older brother also testified as to Petitioner's high moral character. (ST 59-64)

In its findings of fact, the Board did not make any finding of a prima facie showing of good moral character. In a departure from previously reported cases on the subject of admission to the Bar, the North carolina Supreme Court made only passing reference to Petitioner's prima facie showing of good moral character. (Appendix, p. 58) Cf. In re Moore (1981) 301 N.C. 634 at 640, 272 S.E.2d 826; In re Rogers (1979) 297 N.C. 48 at 52-54, 68, 253 S.E.2d 912.

There is, therefore, no indication whether the Board or the Court actually weighed the single incident of alleged misconduct against Petitioner's substantial evidence of good moral character. Such a weighing process is required to afford the applicant due process. Konigsberg

v. State Bar of California (1961) 366 U.S. 36, 42-43; In re Rogers, supra, 297 N.C. 48 at 57.

The words of Mr. Justice Black in Konigsberg (I), supra, 353 U.S. 252 at 273-74, are especially apropos:

> A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis of the Committee's action.

II. THERE IS NO RATIONAL RELATIONSHIP BETWEEN PETITIONER'S FITNESS TO PRACTICE LAW IN NORTH CAROLINA IN 1981 AND ONE INCIDENT OF ALLEGED MISCONDUCT IN 1975, SUPPORTED ONLY BY CIRCUMSTANTIAL EVIDENCE.

Mr. Justice Black, writing for the majority of this Court in Baird v. State Bar of Arizona (1971) 401 U.S. 1, stated a fundamental principle at base of every applicant's attempt to gain admission to the bar:

> The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character. Baird, supra at 9.

The Board and the lower court have raised one incident occurring in 1975 when the Petitioner was 22 years old and a senior in college as a stumbling block fatal to his admission to the

North Carolina Bar.

The North Carolina Supreme Court, itself has stated,

> "Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." In re Rogers (1979) 297 N.C. 48 at 58; 253 S.E.2d 918.
>
> "An application for admission to the bar may not be denied on the basis of suspicions or accusations alone." Id.

The test in this Court on review of a State's refusal to license a bar applicant, was articulated by Mr. Justice Black in Schware v. Board of Bar Examiners, (1957) 353 U.S. 232, as follows:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have rational connection with the applicant's fitness and capacity to practice law. [Citations] ... Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when the action is invidiously discriminatory. [Citation]" Schware, supra, at 240.

The case at bench is similar in posture to that of In re Rogers, supra, 297 N.C. 48 in which the Court found insubstantial evidence of

misconduct on the part of the applicant. The applicant denied all involvement in two incidents of alleged misconduct despite circumstantial evidence and tentative identification by an eyewitness that the applicant did commit the misconduct. Rogers, supra, at 50-51, 66-67.

In the case sub judice, the Board and the Court disregarded important evidence in reaching a conclusion. North Carolina law requires that the Court take into account all that "fairly detracts from the weight of the Board's evidence" and all "undisputed facts which favor the applicant's position." In re Moore, supra, 301 N.C. 634 at 642. First, there was uncontradicted testimony that the camera which Petitioner took into his attic on July 14, 1975 had a roll of film in it which was fully exposed with the exception of possibly one or two trailer frames. (ST 41-42, 86, 89) The record is devoid of expert testimony as to whether a photograph could have been taken of an animated object through the exhaust fan vent in question from a dark attic without flash equipment. Lt. Snipes of the

Chapel Hill Police Department testified at the civil trial that the film in the camera was developed by the police, was fully exposed, and contained pictures of a fireworks display and a sunrise at the beach. (ST 42) This evidence indicates there was not substantial evidence that Petitioner intended to photograph anyone from the attic.

The fact that Petitioner had on a T-shirt and short pants (ST 9, 90) indicates that he did not intend, upon entering the attic, to crawl around in the blown insulation material and move to the other end of the attic which turned out to be over the neighbor's apartment. (ST 16-18, RT 32, 38-40)

A fortiorari, the fact that the exhaust fans, according to Lt. Snipes, (ST 94), afforded a "fairly clear" view of a "large area" of the bathrooms indicates that Petitioner did not drill the holes in one bathroom ceiling with knowledge of its location or for the purpose of peeping

on his neighbors.[1] Petitioner's unrebutted testimony that he had never been in the adjoining apartment, that the testimony at the civil trial indicated a floorplan different from his own apartment, and that there was no means of corresponding the floorplans of either apartment with anything in the attic supports his testimony that he drilled the holes randomly. (ST 27, 39-41, 85, RT 116-126)

In addition, the fact that the location of the entrance to the attic which Petitioner constructed in his own bathroom was near the end of the building opposite the adjoining apartment and was no closer to the adjoining apartment than the perfectly accessible hall entrance supports Petitioner's testimony that he constructed the entrance out of boredom and to provide a means of ingress and egress which would not disturb his roommates. (ST 92, 11-12) The

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[1]The Supreme Court's opinion states incorrectly that holes were drilled in two bathrooms. (Appendix, p. 31) Evidence and findings of the Board show that holes were drilled in, at most, one bathroom. (Appendix, p.42, ST 93)

floorplan was such that if Petitioner had intended to use the entrance as a surreptitious entry to peep on his neighbors, he would have had to walk right over his roommates' bedrooms to reach the portion of the attic over the neighbor's apartment. Too, the cover made over the entrance was rough and did not disguise the entryway. (ST 11-12, 85-86) Since Petitioner was using his bedroom only intermittently that summer, and because his roommates had access to the bathroom (ST 8-9, 12, 85), it is not reasonable to conclude Petitioner was attempting to disguise the entrance.

For the same reasons, had Petitioner intentionally locked the door to his bathroom, he would have only drawn attention to it. If he knew his roommates would not use it, there was no reason for him to intentionally lock the door. Anyone entering the apartment could have locked the door by pushing the lock button and closing the door. Likewise, Petitioner explained that, on other occasions, the button had pressed in when the door was opened against the wall,

causing the door to lock when closed from the outside. (ST 13,75-76,78-79,RT 21-22,250-256,260)

The fact that the evidence showed that an academic book and an inch thick stack of notes on Petitioner's honors thesis were found in the attic near two boards a few feet from the attic entrance (ST 10,85,93,110) lends considerable weight to Petitioner's consistent explanation that he was in the attic to isolate himself and try to restore his concentration on his school work.

The only evidence in support of the Board's conclusion that Petitioner committed misconduct was Petitioner's own testimony and the circumstances with which he admitted his connection at the time. At most, the evidence casts suspicion on Petitioner. There is no evidence in the record which rationally justifies the finding that this single incident of alleged misconduct can rebut Petitioner's substantial evidence of good moral character and render him morally unfit to practice law in North Carolina. Schware, supra, 353 U.S. at 247-248; Rogers,

supra, at 68; Florida Board of Bar Examiners Re: L.K.D. (1981) ___ FLA ___, 297 So.2d 673.

III. THE BOARD OF LAW EXAMINERS VIOLATED DUE PROCESS BY APPLYING A GREATER WEIGHT OF THE EVIDENCE STANDARD OF PROOF TO REACH A CONCLUSION THAT THE APPLICANT GAVE FALSE TESTIMONY TO THE BOARD.

The Board and the North Carolina Supreme Court reasoned that if the Board found by the greater weight of the evidence that Petitioner was in fact guilty of the alleged misconduct of July 14, 1975, then it could automatically leap to the conclusion that Petitioner's innocent explanation of events in question was false. The decision of the Court placed its main emphasis on the findings of false testimony concerning the incident rather than the incident itself. (Appendix, pp. 33-36)

Each of the cases relied upon by the Court in determining that material false testimony before the Board is a ground for disqualification involved failure to report an incident to the licensing board or manifest, documented dishonesty appearing on the face of the application when compared to prior applications or testimony of

the applicant. These cases applied, albeit sub silentio, a beyond a reasonable doubt standard of proof to determine the false or misleading nature of statements by the applicant. The Court in the case at bar cited five cases including: In re Beasley (1979) 243 Ga. 134, 252 S.E.2d 615 (Improperly stating felony charge as misdemeanor and failing to list contemptuous dereliction of child support on application); Application of Walker (1975) 112 Ariz. 134, 539 P.2d 891, cert. denied 424 U.S. 956 (Failing to register for draft for eight years and failure to disclose this fact on application); In re Willis (1975) 288 N.C.1, 215 S.E.2d 771 (Failure to disclose criminal charges and conviction and discipline in Air Force and mistating on application date of arrest, charges, and circumstances of Air Force discharge); Greene v. Committee of Bar Examiners (1971) 4 Cal. 3d 189, 480 P.2d 976 (Failure to list on application civil litigation and arrest warrant and inconsistencies in places of residence and legal experience vis á vis applications to other bars); Petition of Bowen (1968) 84 Nev. 681,

447 P.2d 658 (Concealing past record on application and "undisputed proof" of material false statements on applications).

None of these cases uphold a denialof an application because of findings of false testimony, vis á vis a denial or innocent explanation, predicated on a finding of misconduct.

Additionally, the North Carolina Supreme Court cites In re Gould, (1957) 4 App.Div.2d 174, 164 NYS2d 48 for the proposition that the Board can reject an applicant's explanation of events in toto should it find the testimony "inherently incredible."

Gould involved a disciplinary proceeding of an attorney who admitted the acts of solicitation and assault constituting the misconduct but attempted to explain and mitigate it by saying he was testing his victims' temperaments for employee positions. The Court found the story "patently incredible" and rejected it, but was concerned with the misconduct rather than the false testimony. Gould, supra, 164 NYS2d 48 at 49. Gould, therefore, is inapposite to the case at bench.

California has expressly adopted the beyond a reasonable doubt standard to resolve whether the applicant has given false or misleading testimony to a licensing board. Hall v. Committee of Bar Examiners (1979) 25 Cal.3d 730 at 744, 602 P.2d 768; Siegel v. Committee of Bar Examiners (1973) 10 Cal.3d 156, at 178-179, 514 P.2d 967. Other jurisdictions seem to apply such a standard sub silentio to resolve credibility issues. See e.g. In re Application of G.L.S. (1982) 292 Md. 378, 439 A.2d 1107 (Failure to fully disclose prior felony conviction not intentional); Florida Board of Bar Examiners Re: L.K.D. (1981) ___ Fla. ___, 397 So.2d 673 (Credibility of applicant in denying petty theft resolved in favor of applicant); Reese v. Board of Commissioners (1980) ___ Ala. ___, 379 So.2d 564 at 567 (Failure to disclose criminal charges and detentions not intentional); Application of Henigson (1975) ___ Or.___, 543 P.2d 269 (Credibility issue involving witness saying he did not sell stolen property to applicant was resolved in favor of applicant).

The North Carolina Supreme Court itself said

in In re Moore (1981) 301 N.C. 634, 272 S.E.2d 826 the following:

> "...[W]e question whether the Board should rely on a finding that an applicant lied under oath when the finding is based on nothing more than the applicant's denial of accusations against him ... [The scope of the] inquiry must of necessity concern acts which occurred prior to the hearing. The Board should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and without a finding that he committed the prior acts use his denial that he committed them as substantive evidence of his lack of moral character ..." Moore, supra, at 641. (Emphasis in original)

The Court then added a footnote in which it stated that when the prior acts are not dispositive of a character determination, the "applicant's false statement about the acts then take on added significance." Moore, supra nt.3 at 641. When the prior act is proved, the Board "may then find, if it is so convinced, that the applicant testified falsely under oath." Id.

But the North Carolina Supreme Court has not expressed a standard of proof by which the truth or falsity of an applicant's testimony is to be gauged.

In the opinion in the case sub judice, the

Court seeks to explain the discrepancy between the holding in the present case and the language in Moore, supra, at 641 by arguing that Petitioner in the case at bar did "more" than merely protest his innocence. (Appendix, p. 35) Such a distinction, however, is without substance given the unique nature of a bar admission proceeding. An applicant cannot invoke his 5th Amendment privilege against self-incrimination and refuse to testify as in a criminal proceeding. Indeed, Rule .0603(2) of the North Carolina Rules Governing Admission to the Practice of Law provides for the refusal to license any applicant

> "who fails to disclose fully to the board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings ... whether the same have been terminated or not." See In re Willis, supra (1975) 288 N.C.1 at 9.

It is hard to discern how a bald denial of any connection with alleged misconduct, as was the case in Rogers, supra, and Moore, supra, is any less "evasive or misleading" and possibly obstructing "full investigation into moral character" (Willis, supra, 288 N.C.1 at 18; Appendix,

p. 34) than the full explanation given by Petitioner here for his actions of July 14, 1975. The Court's holding in this case could lead to the anomalous result of an applicant falsely denying, with impunity, all connection with alleged misconduct while another applicant can incur denial of his application based on an innocent, truthful explanation, not subjectively believed by the Board, for suspicious circumstances to which he admits connection.

This very anomaly seems to have prompted the California Supreme Court to adopt a more stringent standard of proof for alleged false statements. Justice Tobriner, writing for the majority in Hall v. Committee of Bar Examiners, supra, (1979) 25 Cal.3d 730 at 745-746, remarked:

> "An individual's courageous adherence to his beliefs, in the face of a judicial or quasi-judicial decision attacking their soundness, may prove his fitness to practice law rather than the contrary. We therefore question the wisdom of denying an applicant admission to the bar if that denial rests on the applicant's choosing to assert his innocence regarding prior charges rather than to acquiesce in a pragmatic confession of guilt ..."

Indeed, giving the Board virtually unlimited

power, as here, to adjudicate truth or falsity based only on circumstantial evidence and uncontradicted testimony of the applicant offends basic fairness and due process. The Board, sitting in its unique tripartite role of judge, jury, and advocate, with the burden of proving misconduct, can raise questions requiring detailed explanations, pick apart the answers, find that there was misconduct, and then, without further fact-findings or analysis, make the quantum leap, based only on subjective indicators, to the conclusion that the applicant lied in his answers. Such latitude is susceptible of being grossly abused to obscure reasons for denial which would clearly not be rationally related to fitness to practice law. Such dangers are not inherent when truth or falsity of testimony is determined by the beyond a reasonable doubt standard.[2]

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[2]It should be noted that a conviction under North Carolina's perjury statute, G.S. 14-209, requires testimony of two witnesses or that of one witness and corroborating circumstances. State v. Allen (1963) 260 N.C. 220, 132 S.E.2d 302.

IV. THE BOARD AND THE COURT COULD NOT RATIONALLY CONCLUDE THAT PETITIONER TESTIFIED FALSELY.

The Court concluded that the

> "Board was presented with testimony that was internally inconsistent, intrinsically implausible and repeatedly contradicted by substantial evidence." (Appendix, p. 36)

In addition to the logical inconsistencies attendant with the Board's conclusions and the evidence overlooked by the Court which have already been discussed in Argument II, supra, there are other problems with viewing the evidence as supporting misconduct and false testimony on the part of Petitioner.

The Court states that Petitioner omitted from the interrogatories any mention of his suspicion that a prowler was in his apartment. It is true that Petitioner did not use the word "prowler" in his answers. He did state in answer to question 50, however, that:

> "...I assumed that the then unknown person was one of my roommates, but I did not know ... Eventually, [the person] retreated from the attic and I thought about coming out. But I felt, at that point, I would appear even more ridiculous for having hid. Too, at this time, I did not know who had

entered the attic or why." (ST 86-87, Appendix, p. 29, See ST 29, 32, 61-62)

Petitioner's character witness, Grayson L. Reeves, Jr., did not recall Petitioner mentioning anything about a prowler in two telephone conversations in early 1981 concerning the incident. Mr. Reeves did state, however, that he believed Petitioner's explanation (ST 64, 70, Appendix, p 29) after reading Petitioner's answers to interrogatories and Plaintiff's depositions in the civil suit, and that it was "consistent with what [Petitioner] told me about it." (ST 65)

The Court states that Petitioner expressed an interest in attics. (Appendix, p.21) The precise testimony indicates that the Petitioner stated he had an interest in construction techniques and that an attic afforded a means of determining the way a building is constructed. (ST 9, 40) Further, Petitioner stated that he had never heard of a common attic before and did not know that such an area existed over his and the adjoining apartment. (ST 17-18)

Additionally, character witnesses testified that Petitioner was under a great deal of pressure to finish his honors thesis prior to his originally scheduled start of law school in August, 1975 (ST 52, 70) and that he normally shuts himself off from people when he pursues academic work. (ST 56, 60, 62)

The Court states that Petitioner's prayer-for-judgment was tantamount to conviction based on State v. Griffin (1957) 246 N.C. 680. But in Griffin, a judgment was entered, a fine imposed, and then a prayer for judgment entered. No judgment was ever entered in the present case, despite a fine being imposed. The Judge entering that decision, himself, stated in a Certificate of Merit on Petition for Rehearing that he believed there to be insubstantial evidence of false testimony and misconduct by Petitioner.[3] (Appendix, pp. 75-82)

In sum, there were no material variations

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[3]Petitioner, on advice of his attorney, did not testify at the court trial in 1975.

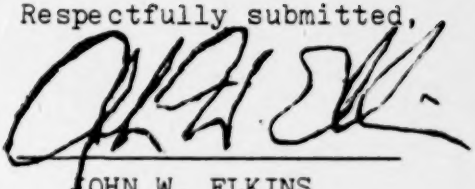
or inconsistencies in Petitioner's testimony. No testimony or evidence was adduced to contradict Petitioner's testimony. Assuming, arguendo, that minor inconsistencies were adduced in testimony, certainly such is insufficient, six years after the incident and based in part on informal conversations with character witnesses a few weeks prior to the hearing, to undermine and rebut Petitioner's considerable evidence of high moral character. The stacking of a circumstantial inference of lying, on top of a finding of misconduct has been disapproved by other courts. See e.g. Florida Board of Bar Examiners Re: L. K.D. (1981) ___ Fla. ___, 297 So.2d 673. In short, no competent evidence supported the conclusion that Petitioner lied to the Board. The decision violated due process. Schware, supra, 240.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to settle the important question of whether Petitioner was denied due process of law in being denied admission to the Bar of North Carolina.

Dated: October 3, 1983

Respectfully submitted,



JOHN W. ELKINS
1500 Mills Tower
220 Bush Street
San Francisco, CA. 94104

Petitioner In Pro Per

CERTIFICATE OF SERVICE BY MAIL

I, JOHN W. ELKINS, do hereby declare under penalty of perjury the following:

1) That I am a United Statescitizen over the age of eighteen.

2) That I am an attorney duly licensed to practice law in all Courts of the State of California.

3) That my business address is 1500 Mills Tower, 220 Bush Street, San Francisco, CA. 94104.

4) That on October 5, 1983, I deposited the attached PETITION FOR WRIT OF CERTIORARI in an envelope with prepaid, first-class postage thereon sufficient to cover the cost of mailing said document and placed THREE COPIES of said document in said envelope and deposited said envelope in a United States Mail receptacle at Winston-Salem, North Carolina and that there is regular postal service through the United States Mail between said place of mailing and the place to which said document was mailed as hereinafter appears and that said envelope was addressed as follows:

HARRY H. HARKINS, JR.
Assistant Attorney General
of the State of North Carolina
Post Office Box 17100
Raleigh, North Carolina 27619

Executed this 5th day of October, 1983 at Winston-Salem, North Carolina.

JOHN W. ELKINS
Declarant

83 - 579

Office-Supreme Court, U.S.
FILED
OCT 5 1983
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOHN WILLIAM ELKINS,

Petitioner,

vs.

BOARD OF LAW EXAMINERS
OF NORTH CAROLINA,

Respondent.

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

JOHN W. ELKINS
1500 Mills Tower
220 Bush Street
San Francisco, California 94104
Telephone: (415) 397-4737

Petitioner, In Propria Persona

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APPENDIX

SUPREME COURT OF NORTH CAROLINA

FILED MAY 3, 1983
Clerk Sureme Court
of North Carolina

IN THE MATTER OF:

JOHN WILLIAM ELKINS,
Applicant to the
February, 1981 North
Carolina Bar Examination

No. 601A82-Wake

Appeal as a matter of right, pursuant to Section 1405 of the Rules Governing Admission to the Practice of Law, from the Judgment of Battle, Judge, Superior Court, Wake County, entered 26 May 1982, ordering the North Carolina Board of Law Examiners (hereinafter

"Board") to issue John William Elkins a license to practice law if he made a passing grade on February 1981 Bar Examination.

Attorney General RUFUS L. EDMISTEN, by Assistant Attorney General HARRY H. HARKINS, JR., for Board of Law Examiners appellant.

SAPP & MAST, by ROBERT H. SAPP for applicant appellee.

MITCHELL, Justice.

The issues presented by the Board's appeal are whether there is substantial evidence to support the Board's findings of fact and whether the findings that the applicant was guilty of misconduct and false testimony are sufficient to deny the applicant's admission to the Bar. We hold that the Board's findings were supported by

substantial evidence and the findings support the Board's conclusion that the applicant presently lacks the requisite good moral character for admission to the Bar.

John William Elkins is an applicant for admission to the North Carolina Bar. His application to take the February 1981 North Carolina Bar Examination was denied by the Board on the basis that he had failed to demonstrate his good moral character. The applicant filed his written application to take the Bar examination in November 1980. On 29 January 1981, a panel of the Board, after notifying Elkins, held a hearing concerning his character and subsequently denied his application.

Elkins requested a de novo hearing before the full Board. He was allowed to take the Bar examination but was advised that the results would be sealed until the Board determined whether he was of good moral character. The applicant appeared with counsel at a formal hearing which was held before the full Board on 15 May 1981. On 21 August 1981, the Board made findings of fact and conclusions of law and issued an order denying Elkins' application to take the February 1981 Bar Examination and permanently sealing his results on the examination. This decision was based on the Board's conclusion that Elkins failed to satisfy the Board that he was of good moral character.

The applicant appealed the Board's decision to the Superior Court. Judge Battle ruled that the Board's findings of fact were not supported by substantial evidence and, even if they were supported by substantial evidence, they would be insufficient to rebut Elkins' prima facie showing of good moral character. Judge Battle ordered that Elkins be granted a law license if he passed the Bar examination. From this Judgment, the Board appeals to this Court pursuant to Section 1405 of the Rules Governing Admission to the Practice of Law promulgated under the authority granted in G.S. 84-24.

The focal point of the controversy in this case is an incident

that occurred in Chapel Hill on 14 July 1975. The undisputed facts are as follows:

Elkins was a student at the University of North Carolina at Chapel Hill and was working on an undergraduate honors thesis in sociology. He had lived in the same apartment for three years and, at the time of the incident, he shared the apartment with three roommates. During the afternoon of 14 July 1975, he arrived at his apartment from his parents' home in Winston-Salem. After his roommates left that evening he began to study, but after a short time he decided to enter the attic in his apartment. In order to do this he moved a dresser from one of the bedrooms

into the hallway and stood on the dresser in order to lift himself through the hatch in the ceiling. The attic did not have a floor and there was blown insulation between the joists. The attic was not air-conditioned and the only light was a dim light from a side vent. The attic was undivided and covered both Elkins' apartment and the apartment next to his which was rented to three females. The only entrance to the attic was from Elkins' apartment.

After viewing the attic Elkins went back into his apartment and then returned to the attic with his study materials, a flashlight, a 35 millimeter camera, a camera tripod and a brace with a quarter-

inch bit. After a short time in the attic, he returned to his apartment and, using an electric drill and a keyhole saw, he created another entrance to the attic in the ceiling of the bathroom that adjoined his bedroom. He covered this opening with a piece of plywood and returned to the attic.

Elkins had been in the attic for several hours when he heard someone attempting to enter the attic. He turned off his flashlight and hid behind a duct. At this point the attic was completely dark. He saw someone look in and search the attic with a flashlight. Elkins then drilled several holes from the attic through the ceiling of the women's apartment. Through these holes and through an

exhaust fan vent from the bathroom, it was possible to see from the attic into the bathrooms and bedroom of the apartment rented to the three women.

The Chapel Hill police were called by the women who occupied the apartment and Elkins was arrested and charged with illegal entry and secretly peeping into a room occupied by a female person. He was tried on these charges upon his plea of not guilty and was convicted in Orange County District Court. The court entered a prayer for judgment continued and a fine of $50.00. A subsequent civil suit for invasion of privacy brought against Elkins by two of the women who lived in the apartment ended in a directed verdict

for Elkins at the close of the plaintiffs' evidence.

The remainder of the evidence brought out in the hearing related to matters which were disputed. Elkins maintained that he entered the attic for the purpose of studying and that he took the camera, tripod, brace and bit into the attic as diversions during his studying. He testified that he intended to clean the camera because it had sand in the mechanism from an earlier trip to the beach. He planned to drill holes in the leg of the tripod in order to attach a carrying strap. He testified that he had no intent to secretly peep on the women in the adjoining apartment and that he did not know that the attic covered both apartments.

He hid in the attic when he heard someone attempting to enter the apartment because he thought it was either a prowler or one of his roommates who would ridicule him for studying in the attic. He drilled the holes because he was dazed and confused and thought the holes would provide ventilation and an opportunity to see if there was a prowler in the apartment below. He believed that he was drilling through the ceiling over his own apartment.

The Board found that Elkins entered the attic and drilled the holes for the purpose of secretly peeping into the bathrooms and a bedroom of the adjoining apartment and that he took his camera into the attic with the specific intent of

photographing the female occupants of the adjoining apartment. The Board also found that Elkins' answers to the interrogatories in the prior civil suit and his testimony under oath before the Board were untrue and given by him with the intent to deceive the court in that prior action and the Board. The Board then concluded that Elkins' actions on 14 July 1975 and his subsequent false testimony before the Board and untrue statements in his answer to the interrogatories in the civil suit rebutted his prima facie showing of good moral character. The Board further concluded that, even if Elkins' prior acts of misconduct were not dis-

positive of his character determination, the false statements and testimony before the Board demonstrated the applicant's present lack of good moral character.

We have previously outlined the procedure used by this Court in reviewing decisions of the Board. In re Moore, 301 N. C. 634, 272 S.E.2d 826 (1981); In re Rogers, 297 N. C. 48, 253 S.E.2d 912 (1979). The findings and conclusions of the Board are judicially reviewed under a "whole record" test to determine if they are supported by "substantial evidence." The applicant has the initial burden of proving his good character. If the Board relies on specific acts of misconduct to rebut

this prima facie showing, and such acts are denied by the applicant, then the Board must establish the specific acts by the greater weight of the evidence.

It is the function of the Board to resolve factual disputes. In re Rogers, 297 N. C. 48, 253 S.E.2d 912 (1979). The reviewing court must take into account whatever evidence in the record detracts from the Board's decision as well as that which supports the decision, but the reviewing court is not allowed "to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter

been before it de novo."
Thompson v. Board of Education,
292 N. C. 406, 410, 233 S.E.2d 538,
541 (1977): see also Baker v. Verser, 240 N. C. 260, 82 S.E.2d 90
(1954).

In the present case, the Board made findings of fact as required by this Court in the case of In re Rogers, 297 N. C. 48, 253 S.E.2d (1979). The basis for the Board's denial of Elkins' application is, in some ways, similar to the rationale used by the Board in the case of In re Moore, 301 N. C. 634, 272 S.E.2d 826 (1981). Specifically, in both cases the Board found that the applicant made false statements under oath. In reversing the Superior

Court's affirmation of the Board's order, we held in Moore that the findings of fact were not complete as they did not include a finding that the applicant's omissions were purposeful and done with the intent to mislead the Board. We also held that the Board had made judicial review impossible in that case by failing to specifically identify the statements which it concluded were false. Finally, we stated that,

> /t /he Board should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and without a finding that he committed the prior acts use his denial that he committed them as substantive evidence of his lack of moral character.

> The Board should first determine whether in fact the applicant committed the prior acts of misconduct.

Id. at 641, 272 S.E.2d at 831 (emphasis in original).

The Board in the present case followed the directive of Moore and specified which statements made by Elkins it considered to be false, found that Elkins made the statements with the intent to deceive the Board and also made findings that Elkins committed the prior acts of misconduct. Those findings were used, in addition to the Board's use of his denial that he committed the acts, as substantive evidence of his lack of good moral character.

The Board's findings were primarily based on Elkins' testimony, testimony of his character witnesses, his answers to interrogatories in the prior civil suit and his related convictions in Orange County District Court. The applicant first contends that the Board erred by using evidence of hs criminal convictions in this Civil matter. We disagree.

We note the general rule that in a civil action for damages evidence of a criminal conviction is not admissible. Tidwell v. Booker, 290 N. C. 98, 225 S.E.2d 816 (1976). However, the rules of evidence before an administrative board permit more latitude than is allowed in court proceedings. Campbell v.

Board of Alcoholic Control, 263 N. C. 224, 139 S.E.2d 197 (1964). A detailed exploration of the reasons for the differences between hearings before an administrative board and court proceedings is unnecessary. It suffices to say that evicence of criminal convictions has long been properly admitted and considered in hearings before boards of law examiners in this and other jurisdictions to determine an applicant's moral character. In re Moore, 301 N. C. 634, 272 S.E. 2d 826 (1981): In re Applicants for License, 191 N. C. 235, 131 S.E. 661 (1926): In re Dillingham, 188 N. C. 162, 124 S.E. 130 (1924): 7 Am.Jur.2d. Attorneys at Law §16 (1980); Annot., 88 A.L.R.

3d 192 (1978). Evidence of a criminal conviction is not conclusive evidence of the applicant's lack of good moral character, but it is some evidence that can be considered by the Board. The Board's use of the applicant's criminal convictions as evidence in the present case was not error.

We next consider whether the Board's findings were supported by substantial competent evidence. We are satisfied from the record before us that they were. Elkins' testimony was internally inconsistent in many respects. Also, there were numerous contradictions and inconsistencies between Elkins' testimony and the other evidence

presented from which the Board could conclude that Elkins was testifying falsely with the intent to deceive the Board.

Elkins testified that he entered the attic to study and because he was interested in attics and in the construction of the roof of the apartment. He testified that he was familiar with attics and building construction and that he initially looked in the attic to learn more about its construction. Yet he also testified that, although he was in the attic at least four hours, it never occurred to him that the attic was undivided and covered the apartment next door as well as his own apartment. In other words,

despite the fact that he was acquainted with attics and was specifically observing the attic construction, he did not realize that the attic was twice as large as his apartment.

Elkins testified that he entered the attic for the first time in the three years that he had been living in the apartment because he was bored and was having difficulty maintaining his concentration while studying. He had never studied by a flashlight or in an attic before nor has he done so since. He wanted a change of scenery from his bedroom, despite the fact that he had just returned from spending ten days in Winston-Salem. He stated that there was no comfortable way to study in

the living room or dining room of his apartment. Therefore, in the middle of July, he climbed from an air-conditioned apartment into an attic that had very little ventilation. Even though he was wearing only shorts and a tee shirt, he decided to study by flashlight while sitting on boards in an attic without a floor and with blown insulation between the joists.

Although Elkins testified that he entered the attic because he was having problems concentrating on his studying, he brought certain "diversions" with him. These included an aluminum tripod in which he planned to drill holes for a carrying strap. This was a project he had failed to begin for weeks but one he thought

he would finally accomplish in July in a dark attic by flashlight. He decided not to use the electric drill in the apartment to accomplish this task in part because he "sometimes (does) things the hard way."

In addition to the tripod and brace, he brought his camera with him into the attic. He testified that, although, the camera was loaded with film, he planned to work on it in the attic because he had taken it to the beach three weeks earlier and it had sand in the lens and winding mechanism. He was afraid the sand would "freeze" the camera movement. Therefore, he thought that a proper diversion from his studies would be to attempt to remove the fine particles of sand from the delicate mechanism of the

camera by the light of a flashlight while sitting on a board in a dark attic and surrounded by blown insulation.

One of the significant acts by Elkins on 14 July 1975 was the cutting of the hole in the ceiling of his bathroom. The apartment had two bathrooms and one entered only into Elkins' bedroom. Elkins testified that he initially entered the attic through the hatch in the ceiling of the hallway. He did this by pulling a dresser from one of the bedrooms into the hallway and climbing from the dresser through the hatch in the ceiling. Despite his intention to study and his several "diversions", he became bored after fifteen to twenty minutes

and decided to create a new opening into the attic. He stated that at the time he cut the hole he did not necessarily plan to use the new opening or to study in the attic at any time in the future. After he cut the new entrance from his bathroom he covered the hole with a makeshift hatch. He testified that he never used this opening to enter the attic.

Certain facts cast doubt upon Elkins' claim that he did not use the newly created entrance and the Board found that his testimony in this regard was untrue and was given by him with the intent to deceive the Board. While Elkins was in the attic, the original opening was found covered and the dresser in

the hallway was pushed back against the wall away from the opening. Evidence produced at the hearing also tended to show that the door to his bathroom containing the newly constructed entrance to the attic was found locked from the inside. Elkins testified that he did not lock the coor.

One of the most significant acts by Elkins was the drilling of the holes. Elkins maintains that the holes were randomly drilled through the ceiling of the women's apartment while he was in a dazed state from being in the attic for several hours in July. Elkins' testimony was that while he was in the attic he heard someone attempting to enter the attic and he hid.

His first thought was that the person was one of his roommates and he did not want to be discovered. He moved further away from the attic entrance as the person returned several times, and scanned the attic with a flashlight. Elkins testified that he drilled the holes because he was hot and the air was stuffy. He thought the holes would provide some ventilation. He also thought that he might be able to tell if the person below was an intruder rather than one of his roommates. He testified that he drilled the holes slowly with the brace so as not to alert the person below. When questioned by the Board as to whether the droppings from the holes would be detectable and therefore alert the intruder to his

presence, Elkins testified that, since the person had been looking in the attic, he assumed the person was already aware of his presence and could not find him in the attic.

Elkins' fear that a prowler might have been in the apartment was omitted from his answers to the interrogatories in the civil suit. He explained this by pointing out that he hastily wrote those answers in three days, at least six months after the incident, and he did not include every detail.

His concern about the presence of an intruder was also omitted from the account he gave to his good friend and character witness, Grayson L. Reaves, Jr. Reaves testified that he talked for "quite some time . . . in

detail" to Elkins about the events of 14 July 1975. He asked Elkins "some pretty serious questions and embarrassing questions" and felt as though he had "cross-examined" Elkins as to the incident, yet he was unaware that Elkins ever suspected that there was a prowler in the apartment.

One of the more striking aspects of the events of 14 July 1975 was the placement of the holes in the ceiling of the women's apartment. Elkins testified that the holes were drilled "randomly", although he moved once to a better hiding place after he had drilled the first hole. The evidence before the Board showed that the "random" holes were all located in the ceiling of the apartment of the

women. In each of the two bathrooms in the women's apartment, holes were drilled over the shower and commode. There were also two holes drilled in the ceiling of one of the women's bedroom. The arresting officer testified that he could see from the attic into the rooms through the holes if he pushed back the insulation. He also stated that he did not think that a photograph could be taken through the holes, but that a photograph could be taken through the vent from the exhaust fan in each bathroom. The view through the vent was fairly clear and encompassed a large area of the bathroom including the shower and the commode.

From the foregoing it is clear that Elkins' testimony was replete

with contradictions and inconsistencies. His actions as he described them were, in his own words, not "entirely reasonable". His account of the events of 14 July 1975was inherently incredible. See In re Gould. 4 App. Div.2d 174, 164 NYS2d 48 (1957)

The applicant challenges the Board's ability to find that he gave false testimony. We have previously recognized the possibility that the Board, in some instances, may find that an applicant's testimony before it was false. In therecent case of In re Moore, 301 N.C. 634, 541 n. 3, 272 SE2d 326, 331 n. 3 (1981), we noted:

> There may, however, be instances where the prior acts are not dispositive of the character determination; applicant's false statements about the acts then take on added significance. In either

> event the Board must prove the commission of the prior act and should first make a finding in regard thereto. It may then find, if it is so convinced, that the applicant testified falsely under oath.

The Board established by the greater weight of the evidence that Elkins committed the prior act. It then made findings of fact that Elkins testified falsely with the intent to deceive the Board. We hold that these findings were supported by the evidence previously summarized herein which was substantial evidence.

Having determined that the Board's findings were proper, we must determine if the findings are sufficient to rebut Elkins' prima facie showing of good moral character. The Board found that specific

statements made by Elkins during his testimony under oath before the Board as well as his sworn responses to interrogatories in the civil suit were "untrue and were given by him with the intent to deceive the Court . . . . (and) the Board." We have previously stated that: "[m]isrepresentations and evasive or misleading responses, which could obstruct full investigation into the moral character of a Bar applicant, are inconsistent with the truthfulness and candor required of a practicing attorney." In re Willis, 288 N. C. 1, S, 215 S.E.2d 771, 781, appeal dismissed, 423 U.S. 976, 46 L.2d 300, 96 S.Ct. 389 (1975). Material false statements can be sufficient to show the applicant

lacks the requisite character and general fitness for admission to the Bar.

We hold that the Board's findings of fact supported its conclusion that Elkins presently lacks such good moral character as to be entitled to take the February 1981 North Carolina Bar Examination.

In reaching this determination, it is unnecessary to decide "whether the Board should rely on a finding that an applicant lied under oath when the finding is based on nothing more than the applicant's denial of accusations against him." In re Moore, 301 N. C. 634. 641. 272 S.E.2d 826, 830 (1981) (emphasis added). We emphasize that the present case involves much more than an

applicant's mere protestation of his innocence of the act which he is accused of committing. The Board was presented with testimony that was internally inconsistent, intrinsically implausible and repeatedly contradicted by substantial evidence.

For the foregoing reasons, Judgment of the Superior Court is reversed and the case is remanded to the Superior Court, Wake County, with instructions to that Court to enter judgment affirming the order of the Board of Law Examiners.

REVERSED AND REMANDED.

****

ORDER

This cause came on to be heard before the Board of Law Examiners of the State of North Carolina (hereinafter referred to as Board) at a hearing conducted on May 15, 1981, for the purpose of considering the application to take the February, 1981 North Carolina Bar Examination filed by John William Elkins (hereinafter referred to as applicant), and receiving evidence from which the Board could determine whether the

applicant had proved that he was of such good moral character as to be entitled to the high regard and confidence of the public and therefore being certified by the Board

to take the North Carolina Bar Examination. The applicant had appeared before a Hearing Panel of the Board which had denied his application. The applicant had re-requested a de novo hearing before the full Board and he was permitted, pursuant to Board Order, to take the February, 1981 North Carolina Bar Examination with his results, therein, to be sealed pending the full Board's final determination of his fitness and character.

The applicant was given due notice and appeared represented by his counsel, Robert H. Sapp of Winston-Salem.

At the hearing, sworn testimony was given by the applicant and several other witnesses. The

applicant, his counsel, and all Board members participating in this decision were present throughout the hearing. The Board considered, as well, the applicant's answers to the questions in his application and the exhibits submitted on behalf of the Board and on behalf of the applicant at the hearing.

Upon reviewing all of the evidence of the hearing including the applicant's application and the exhibits, as aforesaid, the Board makes the following Findings of Fact:

1. On July 15, 1975, applicant was arrested in Chapel Hill, North Carolina, and, following and

arising out of events hereinafter recited, was charged with illegal entry and secretly peeping. To these charges, applicant pled not guilty. Upon trial in Orange County District Court, prayer for judgment was continued upon payment of a fine of $50.00.

2. On July 14, 1975, the applicant drove to Chapel Hill and went to apartment 11-H in the Townhouse Apartments where he had been a tenant for approximately three years.

3. After arriving at his apartment, the applicant began studying and studied for approximately fifteen to thirty minutes. He then entered the attic in his

apartment through a hatch entrance in the hallway.

4. The attic was not floored and had blown insulation between the joists; it had no light and was not air conditioned. The attic extended for the entire area above apartments 11-H and 11-G.

5. The applicant carried to the attic some study materials, a two battery flashlight, a brace with a quarter inch bit, a 35mm camera and a camera tripod.

6. The applicant came down from the attic, went to the bathroom which adjoined and opened only to his private bedroom, and cut another ceiling entrance into the attic using an electric drill and a key hole saw. He also made

a plywood hatch to cover the additional opening. The applicant then re-entered the attic.

7. While the applicant was in the attic, he drilled four or five holes in ceiling area over the adjoining apartment #11-G which was rented by three females. Although applicant testified that the holes were randomly drilled without his knowledge of their actual location, the holes were situated in the ceilings of one of the bathrooms in Apartment #11-G over the commode and in one of the bedrooms.

8. The applicant was in a position where he could see into the bathroom of the girls' apartment.

9. The applicant had never studied in an attic or by the light

of a flashlight prior to this occasion.

10. The applicant entered the attic over Apartments 11-G and 11-H for the purpose of secretly peeping into the bathroom and bedroom of Apartment 11-G.

11. The applicant took his camera into the attic on said occasion with the specific intent of photographing the female occupants of Apartment 11-G while they were in privacy of their bathroom and bedroom.

12. The applicant cut the second attic entrance in the ceiling of his bathroom to facilitate his entry and exit into the attic without the knowledge of his roommates. The applicant intended to

enter the attic on subsequent occasions for the purposes set forth in the two preceding paragraphs, and the second entrance hatchway was created by applicant for this reason.

13. During the course of proceedings before the full Board, applicant identified Board Exhibits 1 and 2 as copies of interrogatories and applicant's responses thereto filed in that certain civil action entitled "Donna Marie Davis and Teresa Austin versus John W. Elkins" filed in the Superior Court of Orange County as case number 76 CvS 29. The plaintiffs in said action were two of the female occupants of Apartment 11-G and said action involved plaintiffs' claims for

damages for invasion of their privacy by the defendant, applicant herein. Applicant's sworn response to interrogatory number 50(Board Exhibit #2) contained essentially the same account of the incidents of July 14, 1975 as testified to by applicant before the full Board; and the applicant testified before the Board that his response to interrogatory number 50(Board Exhibit #2) still reflected the truth of what transpired on the subject occasion. Insofar as said testimony conflicts with these Findings of Fact, said responses to interrogatories were untrue, were known by the applicant to be untrue and were given by him with the intent to deceive the Court in the action in which they were

filed. Furthermore, the applicant's reaffirmation and verification of said responses Board Exhibit 47 were untruthful, were known by the applicant to be untruthful, and were made by the applicant with the calculated intent to deceive the Board.

14. The applicant testified that he had gone into the attic on this particular occasion for the purpose of studying. Said testimony and each part of the testimony thereof was untrue, was known by the applicant to be untrue and was given by him with the intent to deceive the Board.

15. The applicant testified that he did not enter the attic through the hole he had cut in the bathroom ceiling. Said testimony and each part of the testimony thereof

was untrue, was known by the applicant to be untrue and was given by him with the intent to deceive the Board.

16. The applicant testified that he had taken the camera, the camera tripod and the brace and bit to the attic for diversions during his study; that he planned to drill a hole in the camera tripod to mount a carrying strap. Said testimony and each part thereof was untrue, was known by the applicant to be untrue and was given by him with the intent to deceive the Board.

17. The applicant testified on one occasion that he drilled the holes in the ceiling of the apartment to get air; he testified on another occasion that he drilled the holes to see if a

prowler was in the apartment below him. Said testimony and each part thereof was untrue, was known by the applicant to be untrue and was given by him with the intent to deceive the Board.

18. The applicant testified falsely under oath before the Board when he said that he went up into the attic for the purpose of studying; that he cut an entrance to the attic in his bathroom in order to enter the attic without disturbing his roommates; that he took the brace and bit to the attic in order to work on his camera tripod; and, that he drilled holes in the ceiling to get air and to see if intruders were below.

Based upon the foregoing Findings of Fact, the Board concludes:

1. The applicant's actions and conduct as specified in Findings of Fact 10 through 18, singularly and in conjunction, demonstrate that applicant fails to possess such good moral character as to be entitled to the high regard and confidence of the public, and, said acts, either singularly or in conjunction, are more than sufficient to rebut and overcome any prima facie showing of good character which the applicant may have otherwise shown unto the Board;

2. Applicant's false statements and testimony before the Board concerning his prior acts of misconduct demonstrate his present lack of good moral character, even if the Board had determined that the prior acts of misconduct were not dispositive of

the applicant's character determination; and

3. Applicant has failed to satisfy the Board that he is of such good moral character as to be entitled to the high regard and confidence of the public and therefore entitled to take the February, 1981 North Carolina Bar Examination.

IT IS THEREFORE ORDERED THAT:

1. The application of John William Elkins to take the February, 1981 North Carolina Bar Examination be, and is, hereby denied.

2. The results of the February, 1981 North Carolina Bar Examination taken by the applicant, John William Elkins, be, and they are hereby permanently sealed.

Entered this the 21 day of August, 1981 by direction of the Board of Law Examiners.

s/ HORACE E STACY JR.
Chairman

CERTIFIED MAIL #18574
RETURN RECEIPT REQUESTED

****

JUDGMENT - 81 CVS 8373 Filed May 26, 1982) Wake County Superior Court

THIS CAUSE was heard by the undersigned Superior Court Judge at the May 17, 1982, Non-Jury Civil Session of Wake County Superior Court upon the appeal of the applicant, John William Elkins, (hereinafter referred to as "Elkins") from the decision and order of the Board of Law Examiners of the State of North Carolina (hereinafter referred to as "Board") enetered August 21, 1981, denying Elkin's application to take the February, 1981, North Carolina Bar

Examination on the basis of a failure by Elkins to satisfy the Board of his good moral character. The Applicant Elkins was represented by his attorney, Mr. Robert W. Sapp, and the Board was represented by Assistant Attorney General Harry H. Harkins, Jr.

The Court notes that upon this appeal it becomes the duty of this Court to determine upon a review of the whole record whether there is substantial evidence to support the crucial findings made by the Board. In determining the substantiality of the evidence to support the Board's decision, the Court must take into account whatever in the record fairly detracts from the weight of the Board's evidence. The Court may not consider the evidence which justifies

the Board's result without also taking into account contradictory evidence or evidence from which conflicting inferences might be drawn. In view of these requirements, the Court has reviewed the record of the Administrative proceedings, including the transcript of evidence presented at the Board's hearing, and the briefs and arguments of counsel.

At his hearing before the Board Elkins presented substantial evidence of his good moral character. Elkins presented the live testimony of some six witnesses, each of whom testified as to his good moral character. In addition, Elkins presented four affidavits as to his good moral character. Elkins did his undergraduate work at the University of North Carolina at Chapel Hill and graduated with honors in sociology. Following this he was

admitted to the University of North Carolina School of Law. While there he enrolled in the clinical program and his director testified as to Elkin's good character and his concern for his clients, his honesty, and his integrity. Elkins graduated from law school and subsequently was admitted to the Bar in California. Elkins clearly made a prima facie showing of his good moral character.

The Board presented evidence of specific acts of misconduct on the part of Elkins. The Court notes that once Elkins made a prima facie showing of his good moral character, the burden was upon the Board to prove the specific acts of misconduct by the greater weight of the evidence.

The Board's findings of misconduct center around an event which occurred on July 14, 1975. At this time Elkins was working on his honor's thesis in sociology and was a tenant at apartment 11H in the Townhouse Apartments, Chapel Hill, where he had lived for about three years with some other male students. On July 14, 1975, after arriving at his apartment, Elkins studied for a short period of time and then entered the attic to his apartment through a hatch entrance in the hallway. The attic was not floored and there was blown insulation between the joists. There were no lights in the attic and it was not air conditioned. The attic extended for the entire area above apartments 11H and 11G.

Elkins carried with him to the attic some study materials, a two-battery flash light, a brace with a quarter-inch bit, a 35 mm camera which had no operable film in it and a camera tripod.

While in the attic, Elkins drilled four or five one-quarter inch holes in the ceiling area over the adjoining apartment which was rented by three female students.

Elkins was arrested while in the attic and charged with the crimes of illegal entry and secretly peeping. Elkins pled not guilty to the charges and upon trial in Orange County District Court prayer for judgment was continued upon payment of a fine of fifty dollars. A civil action was brought in the Orange County Superior

Court by two of the female occupant of the adjoining apartment. Upon trial of this case the plaintiffs' case was dismissed at the close of the plaintiffs' evidence.

Elkins has consistantly maintained his innocence in regards to the matter, both at the time of his arrest, in answers to interrogatories filed in the civil suit, and in his testimony before the Board. Elkins testified before the Board and has consistently maintained that he went into the attic on this particular occasion for the purpose of studying. Elkins has further testified and maintained that he took the camera, the tripod, and the brace and bit to the attic for diversions during his studies; that he planned to drill a hole in the

camera tripod to mount a carrying strap; that he drilled the holes in the ceiling of the apartment to get air and to see if a prowler was in the apartment below him; that he was under intense pressure and while in the attic he became dazed and confused.

The Board rejected Elkin's testimony and found as a fact that Elkins went into the attic for the purpose of secretly peeping; that he carried his camera into the attic for the purpose of photographing the female occupants and that he cut a hole in the ceiling of his bathroom to enable him to enter the attic on subsequent occasions for the purpose of peeping. Based on these findings the Board further found that Elkins gave false

answers in his answers to interrogatories in the civil action and that he gave false testimony before the Board in again maintaining his innocence.

The Board's findings of facts numbers 10, 11, and 12 pertain to the alleged specific acts of misconduct on the part of Elkins. The Court finds upon a review of the whole record giving fair weight to Elkin's testimony and to Elkin's evidence of his good character, that there is not substantial evidence in the record to support findings of fact numbers, 10, 11, and 12. The circumstances merely give rise to suspicions and conjecture.

EXCEPTION NO. 1

The Board's findings of fact numbers 13 through 18 pertain to Elkin's answers to interrogatories in the civil suit and his testimony before the Board. Since the specific acts of misconduct set forth in findings 10, 11, and 12 are not supported by substantial evidence, it logically follows that findings number 13 through 18 are also not supported by substantial evidence in view of the entire record.

EXCEPTION NO. 2

The Court further finds that even if the Board's findings of fact numbers 10 through 18 were supported by substantial evidence, this would

be insufficient to rebut Elkin's prima facie showing of good moral character.

EXCEPTION NO. 3

The Court rules that this one act of misconduct on July 14, 1975, would not be sufficient to forever bar the applicant from being admitted to the Bar or to rebut the evidence of his otherwise unblemished record.

EXCEPTION NO. 4

The Board clearly seeks to base its decision not only on this act of misconduct but on Elkin's subsequent testimony to the Board which it concludes is false because of its findings that he committed the act

of misconduct. Especially in a situation like the present one where the entire question revolves around "intent", this is an unreasonable price for Elkins to have to pay for maintaining his innocence.

EXCEPTION NO. 5

Upon the foregoing, IT IS HEREBY ORDERED that this matter be remanded to the Board of Law Examiners. If the Applicant, John William Elkins, made a passing grade on the February, 1981, Bar examination the Board of Law Examiners is directed to issue him a license to practice law in this State.

EXCEPTION NO. 6

The costs of this action are taxed against the Board.

By agreement, this Judgment is signed out of term.

This the 26 day of May, 1982.

s/ F. GORDON BATTLE
F. GORDON BATTLE
SUPERIOR COURT JUDGE

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(SEAL)

SUPREME COURT OF NORTH CAROLINA

J. GREGORY WALLACE, CLERK
919 733-3723 P.O. Box 2170
Raleigh, North Carolina 27602

July 11, 1983

Mr. Robert H. Sapp
Sapp & Mast
2225 Wachovia Building
Winston-Salem, NC 27111

Re: In the Matter of: Elkins
No. 601A82

Dear Mr. Sapp:

Elkins' Petition for Rehearing has been filed and the following order enetered:

"Denied by order of theCourt in Conference this the 7th day of July 1983.

s/ Frye, J.
For the Court"

Very truly yours,

s/ J. Gregory Wallace
J. Gregory Wallace
Clerk of the Supreme Court

****

ISSUES RAISED AND LOWER COURT RULINGS

The following is a statement in compliance with Rule 21.1 (h) of the Supreme Court Rules setting forth the point at which the issues set forth in the accompanying Petition for Writ of Certiorari were raised, quotations from the record where pertinent, and references to the Opinion of the Supreme Court of North Carolina and the Judgment of the Superior Court of Wake County, as set forth in this Appendix, noting the point at which these Courts ruled on the issues contained in the Petition for Writ of Certiorari.

ISSUE I: THE BOARD OF LAW EXAMINERS AND THE LOWER COURT HAVE NOT ADEQUATELY CONSIDERED PETITIONER'S SUBSTANTIAL PRIMA FACIE SHOWING OF GOOD MORAL CHARACTER AND HAVE THEREBY CONTRAVENED PRINCIPLES OF DUE PROCESS.

This issue was first fairly raised in the Superior Court in the Appellant's (Petitioner herein) Brief at Page 4 as follows:

"ASSIGNMENT OF ERROR

... (2) The Board failed to state in its Order that its findings were made by the greater weight of the

evidence (Argument III of Appellant's Brief); (3) As a matter of law, the Board erroneously concluded that the single incident of misconduct under inquiry established John W. Elkins' lack of good moral character (Argument IV of Appellant's Brief)."

"...IV. As a matter of law the single incident of alleged misconduct involved in this case, even if the Board had proved it by the greater weight of the evidence, is insufficient to rebut the applicant's showing of good moral character." (Appellant's Brief, p. 16)

The Superior Court of Wake County ruled in Petitioner's favor on this issue in its Judgment, Appendix, p.60, under Exception No. 2 which reads:

"The Court further finds that even if the Board's findings of fact numbers 10 through 18 were supported by substantial evidence, this would be insufficient to rebut Elkin's prima facie showing of good moral character."

The federal question under issue I was fairly raised in the Supreme Court of North

Carolina in Appellee's (Petitioner herein) Brief at page 15, argument "II" captioned,

> "THE SINGLE INCIDENT OF ALLEGED MISCONDUCT INVOLVED IN THIS CASE, EVEN IF THE BOARD HAD PROVED IT BY THE GREATER WEIGHT OF THE EVIDENCE, IS INSUFFICIENT TO REBUT THE APPLICANT'S SHOWING OF GOOD MORAL CHARACTER."

The Court held that "the Board's findings of fact supported its conclusion that Elkins presently lacks such good moral character as to be entitled to take the February 1981 North Carolina Bar Examination..." Appendix, p. 35, See discussion of issue at Appendix, pp. 33-35.

Petioner also raised the federal question fairly in his Petition for Rehearing to the North Carolina Supreme Court at page 3, argument "I", captioned, "THE OPINION OF THECOURT DOES NOT VIEW THE WHOLE RECORD IN REACHING ITS CONCLUSION." The argument discussed exception "1" in the Petition for Rehearing at page 1, stating, "The opinion of theCourt has apparently overlooked large portions of the "whole record"

pertaining to applicant's strong showing of good moral character."

The Court summarily denied the Petition for Rehearing without opinion. Appendix, p. 64.

ISSUE II: THERE IS NO RATIONAL RELATIONSHIP BETWEEN PETITIONER'S FITNESS TO PRACTICE LAW IN NORTH CAROLINA IN 1981 AND ONE INCIDENT OF ALLEGED MISCONDUCT IN 1975, SUPPORTED ONLY BY CIRCUMSTANTIAL EVIDENCE.

The federal question of due process raised in this issue wasfairly raised in the Superior Court of Wake County in Appellant's Brief at page 4 under "Assignment of Error...(1) The Board made findings 10 through 18 upon insufficient evidence (arguments I and II of this Brief)..." The assignments of error "2" and "3" set forth at pages 62-63 of the Appendix also fairly raised the federal question involved in issue "II" herein.

The Superior Court ruled in favor of the Petioner on this issue in its Judgment, Exception 1, at page 60 of the Appendix,as follows:

> "Exception No. 1 ... The Board's findings of fact numbers 13 through 18 pertain to Elkin's answers to interrogatories in the civil suit and his testimony before the Board. Since the specific acts of misconduct set forth in findings 10, 11, and 12 are not supported by substantial evidence, it logically follows that findings number 13 through 18 are also not supported by substantial evidence in view of the entire record."

The Petitioner fairly raised the question in the North Carolina Supreme Court in Appellee's Brief at page 12 in an argument captioned, "Circumstantial Evidence in this Case Fails To Support the Board's Finding of Fact By The Greater Weight of Substantial Evidence." Appellee argued, "...(T)he Board was not entitled to conclude the opposite of Mr. Elkins' testimony solely on the basis of its disbelief. Therefore the Board must have relied upon circumstantial evidence to support its findings... However, it must be pointed out again that under the whole revord rule whatever in the record fairly detracts from the weight of the Board's evidence must be

taken into account." Appellee's Brief, p. 12

The Supreme Court of North Carolina held that "(T)he Board established by the greater weight of the evidence that Elkins committed the prior act." Appendix, p. 33. The Court went on to conclude that the Board's findings of fact supported its conclusion that Petioner lacked the requisite moral character for admission to the North Carolina Bar. Appendix, p. 35. The Court never specifically ruled, however, whether the misconduct alone, without the findings of false testimony about the incident, would have justified the Board's conclusion.

Petitioner also raised the federal question in his Petition for Rehearing in exception "8" at page 3 of the Petition as follows: "For the foregoing reasons, the opinion reaches a result which is contray to fairness and due process of law in that the grounds for denial of the applicant's application are not rationally related to the applicant's moral fitness to practice law in this State."

As previously stated, the Court summarily denied the Petition for Rehearing.

ISSUE III: THE BOARD OF LAW EXAMINERS VIOLATED DUE PROCESS BY APPLYING A GREATER WEIGHT OF THE EVIDENCE STANDARD OF PROOF TO REACH A CONCLUSION THAT THE APPLICANT GAVE FALSE TESTIMONY TO THE BOARD.

Although issue III herein was not expressly raised prior to the Petition for Rehearing, it was fairly subsumed under assignment of error "1", set out supra at page 69 of this Appendix, of Appellant's Brief in the Superior Court. Petitioner argued, "...The Board's findings 13 through 18 [concerning false testimony] cannot be used to support the Board's conclusions. Appellant's Brief in Superior Court, p. 5.

The Superior Court in its Judgment staed at Exception No. 4 the following:

> "The Board clearly seeks to base its decision not only on this act of misconduct but on Elkins' subsequent testimony to the Board which it concludes is false because of its findings that he committed the act of misconduct. Especially in a situation like the present one where the entire question revolves around "intent", this is an

unreasonable price for Elkins to have to pay for maintaining his innocence." Appendix, p. 62

The due process issues involved in Issue III herein were fairly raised in the Appellee's Brief to the North Carolina Supreme Court at page 9, captioned, "The Board is Not Entitled to Reject Elkins' Testimony and Conclude the Opposite". Petitioner argued,

> "The Board now argues that it is entitled to conclude that the applicant lied and from the finding that the applicant lied find that the applicant committed the alleged acts of misconduct and then from the findings of the alleged acts of misconduct find that the applicant lied. When so stated, the flaw in this argument becomes obvious." Appellee's Brief, p. 9-10.

The Court held that the Board "made findings of fact that Elkins testified falsely with the intent to deceive the Board. We hold that these findings were supported by the evidence previosly summarized herein which was substantial evidence". Appendix, p. 33. See Appendix, pp. 32-36 for discussion by Court of issue of Board's making findings that the applicant testified falsely

concerning the alleged incident of misconduct.

Petitioner also fairly raised the issue in his Petiton for Rehearing. Petioner argued, inter alia , the following points:

> "3. The opinion has misapplied the case of In re Moore ...[which] should not be read to stand for the proposition that the Board can make findings of fact that an applicant lied under oath when supported by nothing more than disputed interpretations of circumstantial evidence and the applicant's materially consistent explanation of his actions and when there are no specific findings of fact by the Board on how they arrived at their conclusion that the applicant lied under oath."
>
> "5. The Court misapprehends the explanation of the applicant as something more than protestation of innocence. Because of the requirement that an applicant to the bar answer all relevant questions ... the applicant had no choice except to explain the events of July 14, 1975."
>
> "6. ...Because reasonable minds can differ on the substantiality of evidence supporting misconduct, there is on these facts, insubstantial evidence to support a finding that the applicant lied."
> Petition for Rehearing, page 2.

Petitioner also raised point "8" as set out supra at page 70 of this Appendix.

ISSUE IV. THE BOARD AND THE COURT COULD NOT RATIONALLY CONCLUDE THAT PETITIONER TESTIFIED FALSELY.

The federal question of due process concerning this issue was fairly raised in the Superior Court under assignment of error "1" set out supra at page 69 of this Appendix.

The Superior Court ruled for Petitioner on this issue at Exception No. 1 (Appendix, p. 69) and Exception No. 4 (Appendix, p. 71) contained in the Court's Judgment.

Petitioner argued in Appellee's Brief to the North Carolina Supreme Court at page 15 that"...Since the Board has failed to prove any specific acts of misconduct, then the Board cannot find that Mr. Elkins testified falsely with the intent to deceive the Board. Therefore the Board's findings thirteen through eighteen [concerning false testimony] are not supported by substantial evidence."

The Court ruled that the findings of false testimony were supported by substantial evidence. Appendix, pp. 33-36

Petitioner also raised this due process issue in his Petition for Rehearing at exceptions "6" (Appendix, p. 73) and "8" (Appendix, p. 70).

****

SUPREME COURT OF NORTH CAROLINA

IN THE MATTER OF:

JOHN WILLIAM ELKINS, Applicant to the February 1981 North Carolina Bar Examination	))))	CERTIFICATE OF C.C. Cates, JR. No. 601A82 - Wake

---

I, C.C. CATES, JR., do hereby state and declare under penalty of perjury the following:

1. That I am an attorney licensed to practice law in all Courts of this State and have been so licensed for more than five years.

2. That I have spoken with John William Elkins, applicant to take the February, 1981 North Carolina Bar Examination at length concerning his fitness to practice law in this State including the incident involving alleged peeping and illegal entry occurring on July 14, 1975 in Chapel Hill, North Carolina.

3. That I have independently examined the opinion of this Court, and some of the authorities cited therein, filed May 3, 1983 reversing the judgment of the Honorable F. Gordon Battle, Judge of Wake County Superior Court and reinstating the decision of the Board of Law Examiners of North Carolina to deny John W. Elkins a license to practice law in this State due to his failure to establish that he is of sufficiently high moral character.

4. That I have reviewed portions of the record in this case and am generally familiar with the facts and allegations therein contained.

5. That I presided as Judge on September 21, 1975 in Orange County District Court in the criminal action originally involved in this case against Mr. Elkins.

6. That I heard testimony of one of the women in this case alleging that Mr. Elkins went into an attic extending over his own apartment and that of the apartment next door occupied by the women for the purpose of peeping

on them through one-quarter inch holes which he drilled in their ceiling and through an exhaust fan vent located near some of these holes.

7. That I heard testimony of Lieutenant Snipes of the Chapel Hill Police Department that Mr. Elkins was discovered in the attic approximately fifteen feet from the entrance to the attic over his apartment and that upon further investigation, he discovered a 35mm camera, a tripod, a brace with a one-quarter inch bit attached, and various study materials also located in the attic.

8. That I entered an order that both charges be combined and a prayer for judgment continued be entered with a fine imposed of $50.00 plus court costs.

9. That I entered this order with the specific intent that this matter should not affect Mr. Elkins' subsequent law career of which I was aware that he was planning to pursue.

10. That I believe the opinion of the Court is in error in the following respects:

a. The Court has placed undue emphasis on one incident in Mr. Elkins' life which incident is characterized by highly disputed motives for his having entered the attic of his apartment. The Court has not given adequate consideration to the testimony of numerous witnesses including family and long-time friends of Mr. Elkins that he is a person of high moral character and has a reputation for honesty and integrity.

b. The Court has omitted or misstated certain material facts pertaining to the incident in question including the following:

i. That the women were not at home at the time Mr. Elkins was allegedly over their apartment leaving no opportunity to actually peep on the women.

ii. That the Court apparently has overlooked the affidavits of Mr. Elkins' roommate, Joseph L. Brady, Jr. and Lieutenant

Thomas W. Snipes to the extent that they corroborate certain portions of Mr. Elkins' explanation of the events of July 14, 1975.

iii. Although the cutting of the hole in his own bathroom appears to have been an immature disregard for his landlord's interests, there is no evidence in the record which supports a finding that Mr. Elkins lied about the purpose for his cutting the hole or his use of it.

iv. There is no logical explanation why Mr. Elkins would drill small holes through which to peep when there was uncontradicted evidence that a nearby exhaust fan vent afforded a good view of the bathroom below.

v. There is no direct evidence in the record to rebut Mr. Elkins' claim that he was in the attic to study. Although the claim is a strange one and in combination with the other facts tends to cast suspicion on him, when analyzed, the evidence is insufficient to sustain a finding that Mr. Elkins lied under oath to the Board of Law Examiners and

is thereby unfit to practice law in this State.

11. That I believe that the opinion of the Court cites case law, the holdings of which rely on facts not applicable to this case in the following respects:

a. The cases cited by the Court in support of its position that the Board can deny a license by concluding the explanation given by Mr. Elkins is inherently incredible, each involve situations where the applicant failed to report an incident to the examiners or made material false statements which falsity was undisputed or was substantiated by documented evidence.

b. The case of In re Gould involves a disbarment of an attorney who apparently admitted the acts which constituted the misconduct but gave an explanation which apparently contradicted numerous witnesses to numerous acts of alleged misconduct fitting a pattern. Such a case is not controlling in the present situation.

c. The Board's undue weight to this one highly disputed incident in Mr. Elkins' life is very similar to the case of In re Rogers in which this Court reversed the Board's denial of Mr. Rogers' application to stand the Bar. The findings of the Board especially with respect to photographing and lying under oath about the activities of July 14, 1975 are simply not supported by substantial evidence when the whole record is examined taking into account the testimony of Mr. Elkins' character witnesses.

d. There is insufficient rational connection between fitness to practice law in North Carolina in 1983, especially when Mr. Elkins is licensed in good standing and is actively practicing in another state, and his conduct on July 14, 1975 in an attic over his apartment and his subsequent explanations for his actions to warrant the Board of Law Examiners' refusal to license Mr. Elkins.

For the foregoing reasons, I would request and recommend that this Court reconsider on rehearing its decision filed May 3, 1983 denying John William Elkins' application to stand the February, 1981 North Carolina Bar Examination.

Dated: May 23, 1983

s/C.C. CATES, JR.
C.C. CATES, JR.

(NOTARY SEAL OF KAY M. DUNN,
notary public in Alamance
County, North Carolina)

****

THE STATE BAR OF CALIFORNIA

(SEAL)

555 Franklin Street
San Francisco 94102
Telephone 561-8200
Area Code 415

October 24, 1980

TO WHOM IT MAY CONCERN:

This is to certify that according to the records of the State Bar JOHN WILLIAM ELKINS was admitted to the practice of law in this state by the Supreme Court of California on February 14, 1980; that he has been since the

date of his admittance, and is at date hereof, an ACTIVE member of the State Bar of California; that no charges of professional or other misconduct against him have been filed with the State Bar, nor any proceedings instituted by the State Bar against him; and that no recommendation for his discipline for professional or other misconduct has ever been made by the Board of Governors or a Disciplinary Board to the Supreme Court of California.

THE STATE BAR OF CALIFORNIA

s/ Jeanine K. Cardinelli
Jeanine K. Cardinelli
Supervisor
Membership Records

[Filed with North Carolina application.]

****

It should be noted that the date of admission to the State Bar of California as indicated above was February 14, 1980. Petitioner, however, was certified in November, 1979 and, because he was out of California until

February, was not sworn in until February 14, 1980. The date of admission referred to throughout this Petition is the date of certification rather than the formal ceremony.

****

THE STATE BAR OF CALIFORNIA
BOARD OF GOVERNORS

(SEAL)

Acknowledges and Commends

John Elkins

for outstanding contributions in the delivery of pro bono and low fee legal services

October 1982

s/Anthony Murray
Anthony Murray
President, Board of Governors
State Bar of California

****

It should be noted that the foregoing certificate of commendation was not presented to the Board of Law Examiners of North Carolina as the certificate was not issued until October, 1982. The certificate was presented as a "Proposed Exhibit 1" in the Petition for Rehearing as new evidence to be introduced on rehearing.

CERTIFICATE OF SERVICE BY MAIL

I, JOHN W. ELKINS, do hereby declare under penalty of perjury the following:

1) That I am a United States citizen over the age of 18;

2) That I am an attorney duly licensed to practice law in all Courts of the State of California;

3) That my business address is 1500 Mills Tower, 220 Bush Street, San Francisco, California 94104;

4) That on October 5, 1983, I deposited the attached APPENDIX TO PETITION FOR WRIT OF CERTIROARI in an envelope with first class, prepaid postage sufficient to cover the cost of mailing said document and that I placed said envelope in a United States Mail receptacle at Winston-Salem, North Carolina and that there is regular United States Mail service between said place of mailing and the place to which said document was addressed and that I placed THREE COPIES of said document in said envelope addressed as follows:

HARRY H. HARKINS, JR.
Assistant Attorney General
Post Office Box 17100
Raleigh, North Carolina 27619

Executed this 5th day of October, 1983 at Winston-Salem, North Carolina.

JOHN W. ELKINS